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No. 81-2245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NEVADA,
Petitioner,
v.
UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether water rights adjudicated by a federal court to a party (in this case, the United States) in an all-inclusive quiet title litigation are fixed inter se so as to provide res judicata protection to right holders in privity to that party.

2. Whether a federal court, as opposed to Congress, should change a time-honored doctrine developed by those state courts most intimately involved with water rights and hold that parties were not technically "adverse" to each other under the pleadings, even though the purpose of the litigation was to settle all rights to the water at issue.

LIST OF PARTIES

The Plaintiff-Appellant in the United States Court of Appeals for the Ninth Circuit was the United States of America. The Plaintiff-Intervenor-Appellant in the Ninth Circuit was the Pyramid Lake Paiute Tribe of Indians. The Defendants-Appellees in the Ninth Circuit were the Truckee-Carson Irrigation District, the State of Nevada, the Sierra Pacific Power Company, the City of Reno, Nevada, the City of Sparks, Nevada, the County of Washoe, Nevada, Albert A. Alcorn and approximately 17,000 other individually named persons, firms, partnerships and corporations located in the State of Nevada.* The Truckee-Carson Irrigation District appeared in its own right and as class representative of approximately 4,000 Newlands Project right holders. As discussed more fully below, the State of Nevada appeared in several capacities.

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* A list of the approximately 17,000 persons and entities, as it appeared before the Ninth Circuit, has been filed with the Clerk of this Court.

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BRIEF OF PETITIONER

OPINIONS BELOW

The Memorandum Decision, Findings of Fact and Conclusions of Law, and the Judgment of the United States District Court for the District of Nevada, all dated December 12, 1977, are not reported but were printed as Appendices to the Petition for a Writ of Certiorari (hereinafter "Nev. App.") at 161a, 180a and 195a.[1] The decision of the United States Court of Appeals for the Ninth Circuit, dated June 15, 1981, affirming in part and reversing in part the decision of the District Court, is reported at 649 F.2d 1286 and appears at Nev. App. 197a. The two orders of the Ninth Circuit modifying the court's

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[1] The District Court also entered an interlocutory decision, not at issue here, which was dated February 5, 1975, and which appears at 71 F.R.D. 10, holding, *inter alia*, that a separate trial would be held on the affirmative defenses of res judicata and collateral estoppel.

opinion, dated July 10, 1981, and January 5, 1982, respectively, are not reported but appear at Nev. App. 254a-256a. The order of the Ninth Circuit denying the petition for rehearing and the suggestion for rehearing en banc, dated March 11, 1982, is not reported but is printed at Nev. App. 260a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 8, Clause 3, of the United States Constitution reads in pertinent part: "The Congress shall have Power * * * To regulate Commerce * * * among the several States, and with the Indian Tribes * * *."

Although several United States statutes were cited in the decisions below, Petitioner does not specifically rely upon any of them in this Petition.

STATEMENT OF THE CASE

The Truckee River is the life-blood to the largest population center in western Nevada. It originates in California from Lake Tahoe, winding its way through approximately twenty miles of that State and 65 miles of the State of Nevada. It passes through the Nevada cities of Reno and Sparks, and terminates into Pyramid Lake. The Lake is approximately 20 miles long and five miles wide. Appendix to Nevada's Petition for a Writ of Certiorari ("Nev. App.") 182a.[2] Part of the Truckee's flow is diverted in Nevada through the Truckee Canal for the Newlands Project, the first Federal reclamation project ever authorized by Congress and the first ever built.

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[2] "Nev. App." is to be distinguished from "TCID App.", which refers to the Appendix to the Petition for a Writ of Certiorari filed by the Truckee-Carson Irrigation District in No. 81-2276. "Tr." refers to the transcript of record in the instant case, and "Ex." refers to an exhibit introduced in the instant case. "JA" means the Joint Appendix filed by all parties in Nos. 81-2245, 81-2276 and 82-38.

Major settlement of western Nevada began with the discovery and development of the Comstock Lode at Virginia City in the late 1850's. See Ex. A-99005 (JA 402). The Pyramid Lake Paiute Reservation was initiated by Government action on December 8, 1859, when its land was withdrawn from the public domain for the use and benefit of the Paiute Tribe of Indians (who became a Tribe in 1936 and who are hereinafter referred to as "the Tribe"). Nev. App. 56a-57a, 182a; Exs. A-3, A-99013, A-99014, U-491.[3] This action was confirmed by an Executive Order issued by President Grant in 1874. Ex. A-99034; Nev. App. 57a, 182a. By the early 1880's most of the farm land in the Truckee River basin had been settled. Nev. App. 68a-141a.

The Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, was passed by Congress in 1902, and fifteen days later the Secretary of the Interior withdrew the areas required for the Newlands Project. Nev. App. 58a-59a. The fishery in the lower reaches of the Truckee River and Pyramid Lake had been declining for various reasons for a long period of time, but a marked decline occurred after the diversion of water from the Truckee River for the Newlands Project began in 1905.[4]

In 1908, this Court rendered its historic decision in *Winters* v. *United States*, 207 U.S. 564, which established the reserved rights doctrine for Indian water rights. The Court held that upon setting aside lands for an Indian reservation, sufficient waters are impliedly reserved to satisfy the purposes for which the reservation was established when such purposes require water.

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[3] Pursuant to this Court's Rule 34.5, an Appendix to this brief shows, in numerical order, the place in the record below where each exhibit cited in this brief was offered and admitted into evidence.

[4] See testimony of Dr. James W. Hulse, Tr. 4378-79, 4390-4446, 4497-99, 4538-59, 4598-4620, 4625-26, 4655-65, 4677-80, 4698-99, 4747, 4755-85, 4804-10, 4955, 4958-59.

Five years later, on March 3, 1913, the United States commenced a quiet title action in the United States District Court for the District of Nevada, known as *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (*"Orr Ditch"*). The United States sued on its own behalf and on behalf of both the Indians and the Newlands Project landowners; there were ultimately hundreds of named defendants, all of whom are listed at Nev. App. 18a-53a.[5] The Government there sought to quiet its title in *Winters* reserved right for the Pyramid Lake Reservation as well as to adjudicate the water rights for the Newlands Project. The case went forward on the Amended Complaint of the United States, which separately set forth the claims for the Reservation and the Project, specifically identifying different quantities of water, places of use, means of diversion, and priorities for the two claims. Nev. App. 2a-8a.

Paragraph 16 of the Amended Complaint stated that the Governmental purpose in instituting the action was,

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[5] The interrelationship between this case and *Orr Ditch* makes it important clearly to identify the parties now before the Court.

In *Orr Ditch*, the United States, acting on behalf of the Tribe and the farmers of the Newlands Reclamation Project, as well as on its own behalf brought suit against all other water users on the Truckee River to determine the water rights of each appropriator. Judgment was rendered, and no appeal was taken.

In the present case the United States sued to increase its water rights for the benefit of the Tribe, the Stillwater Wildlife Refuge, the Toiyabe National Forest, and other interests. The Tribe intervened as a party plaintiff. The defendants in the present case included the *Orr Ditch* defendants, appropriators of water from the Truckee River who initiated their use after the *Orr Ditch* proceedings, TCID as representative of the Newlands Project farmers, and the State of Nevada. The District Court dismissed the plaintiffs' claims for a discreet reserved fishery water right.

For convenience we shall refer to the parties by their designation in the present case in the District Court. Accordingly, "plaintiffs" refers to the United States and the Tribe. "Defendants" includes the *Orr Ditch* defendants, subsequent appropriators, TCID, and the State of Nevada.

among other things, to protect the "Indians and their descendants in their homes, fields, pastures, fishing, and their use of said land and water * * *." Nev. App. 6a; *see also id.* at 185a. The *Orr Ditch* defendants contested the purpose of the Reservation in their answers. *E.g.*, Ex. B-462 at 13-15. Paragraph 18 of the Amended Complaint identified the futher Government objective of determining the *several* rights of all claimants, including the United States, and of avoiding a multiplicity of suits.[6] The prayer sought a determination of the relative rights of all the parties "to the end that it may be known how much of said waters may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion, and with what priorities." Nev. App. 10a. The Federal District Court found in the instant action that *Orr Ditch* was intended by all concerned as a general all-inclusive water adjudication to determine the relative rights of the parties to the use of the Truckee River. Nev. App. 185a; see also *id.* at 145a, 225a. As the court put it:

> * * * *Orr Ditch* was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the waters of the Truckee River and its tributaries, both natural and flood waters, to the end that its decree would determine the relative rights of the parties thereto so that "it may be known how much of said waters may

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[6] The relevant provision reads:

> Until the several rights of the various claimants, parties hereto, *including the United States*, to the use of the waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of *each right* to divert said waters from said river and its tributaries has been judicially determined the United States can not properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could be so protected would necessitate a multiplicity of suits. [Nev. App. 10a; emphasis added.]

> be diverted from said river by the parties hereto and *for what purposes, where, by means of diversion, and with what priorities,*", and required *all parties to fully set up their respective water right claims.*
>
> * * * [I]t was the intention of the plaintiff, by and through its attorney, the Bureau of Indian Affairs, and the Bureau of Reclamation, to assert *as large a water right as possible* for the Indian reservation, and to do everything possible to protect the fish for the benefit of the Indians and the white population insofar as it was "consistent with the larger interests involved in the propositions having to do with the reclamation of thousands of acres of arid and now useless land for the benefit of the country as a whole." * * * [Nev. App. 185a; emphasis added.]

Thus, it was the intention of the United States to assert as large a water right as possible for the Reservation,[7] and to do everything possible to protect the fish for the benefit of the Indians and the white population insofar as this objective was not inconsistent with the larger reclamation interests. Exs. A-80241k (JA 271); U-12 (JA 273); Nev. App. 185a. However, in what proved to be critical to the Ninth Circuit analysis, the Amended Complaint alleged nothing further to indicate that the determination of the separately set-out claims for the Reservation and the Project would be binding *inter se*. Nev. App. 243a.

Prior to the institution of *Orr Ditch*, and during its pendency, a serious and reasonable doubt existed as to

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[7] For example, an attorney for the United States in the first phase of *Orr Ditch* wrote to the Chief Engineer of Indian Irrigation Service:

> I have had in mind the necessity of securing as large a right for the reservation lands as possible and having the reserved rights of the Government well in hand, have planned to plead liberally so as to accomplish that purpose and at least not to foreclose any proper claim the Government can make. [Ex. A-11008B (JA 275).]

whether any *Winters* reserved water right could be claimed at all for an Executive Order Indian reservation. Nev. App. 185a. It was well recognized that establishing such a right for the Paiute Reservation would be very valuable.[8]

In 1918, an attorney for the United States, in seeking an order to obviate the need for any further pleadings among the parties, argued the all-inclusive nature of the *Orr Ditch* cause of action.[9]

District Judge Farrington agreed. He held in that same year:

> It is peculiarly the duty of a court of equity, in so far as possible, in every case over which it has acquired jurisdiction, to settle all controversies among the

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[8] As the Superintendent of Indian Irrigation wrote to the Commissioner of Indian Affairs in 1917: "The water rights of the entire Truckee River are now in the process of adjudication and every appropriator on the river has been made a party to the suit which was instituted in behalf of the United States of America in the interests of the Truckee Carson Project of the Reclamation Service and Indians of the Pyramid Lake Reservation. It is hard to say just when this suit is to be settled. It has now been in the Court for many years. However, when the adjudication is accomplished, the status of the water rights will be definitely established, and for the early priorities this will be a very valuable thing." Ex. A-30767H (JA 285).

[9] He wrote Judge Farrington:

> A. Where, as in a water suit of this kind, a singe *res* e.g. water supply, is to be divided and apportioned between a number of persons, each of whom claims rights adverse to, but contingent and interdependent upon, the rights of others, equity will not dispose of this res by piecemeals, but as a whole; which means the determination of the rights and priorities of each user.
>
> B. That in order to determine each of these adverse, but contingent and interdependent rights, a court of equity has the inherent power to bring in as parties every claimant of such rights; and this necessarily means that each such claimant must be so placed relative to the suit that the decree shall be final as to him. [Ex. A-99008 (JA 288).]

> parties touching the subject matter of the action, in order to avoid a multiplicity of suits. * * *
>
> The Plaintiff here has asked a determination of the relative rights of the parties, and as against the plaintiff each defendant has set up his claim, and asked that his rights be fixed. * * * *The rights thus claimed are affected, more or less, by every diversion or claim made by any of the defendants.* [Ex. A-99037 (JA 300-301, 303), emphasis added.]

The Judge discussed, further, the eventual effect of res judicata in respect to any decree he might enter:

> * * * [w]here an issue has been fairly tried and determined, *though not formulated in the pleadings*, as between the co-defendants the decree concludes and estops all parties to the cause who have actually joined in litigating the issue, or who have had an opportunity to say and prove all they can in relation to it. * * * It is desirable that the present litigation shall *finally settle all controversies* over the waters of the Truckee River * * *. [*Id.* (JA 304, 308-309); emphasis added.]

The taking of testimony continued for nearly two years before a Special Master. The United States assumed the burden of proving the purposes for which the Reservation was established and which of those purposes carried with it a *Winters* reserved right. One of the most important records introduced was an 1859 letter from the Commissioner of the General Land Office to the Survey General of Utah instructing him to reserve the Pyramid Lake and Walker River reservations for "Indian purposes". Ex. U-491; see also Ex. A-99012 (JA 379-381). The phrase "Indian purposes" became an important inquiry in determining the nature of any water rights which might be held by the United States on behalf of the Tribe. In connection with the purposes of the Reservation, the United States introduced two other 1859 letters describing the fisheries located at the proposed Reservation and the agricultural and fishing uses of the water. Exs. A-99013, A-99014. The United States im-

plicitly conceded that *all* the purposes for which the Indian Reservation had been withdrawn were before the Special Master and the court.[10] In 1921 a Special Assistant to the Attorney General who had entered the case reported to the Attorney General respecting what the United States was seeking: "* * * * the establishment of its reserved water rights, both as to the Indian Reservation and the Reclamation Project * * *". Ex. A-11022B.

During the period 1921-1924, a Special Supervisor of the Reno Indian Agency—whose job it was to work closely with the Indians—made an intensive study of water needs for the fishery. Ex. U-95 (JA 317); *see also* Ex. U-100 (JA 318). He filed a preliminary report with the Commissioner of Indian Affairs, pointing out that "The plans of the Reclamation Service apparently are based upon the use of every drop of water in the Truckee River for irrigation purposes. If this assumption is sustained, this means the total extermination of the Pyramid Lake trout within a very short period of time." Ex. U-101 (JA 322); *see also* Exs. U-106 (JA 335), A-30196H.

But the Acting Commissioner of Indian Affairs, responding to the preliminary report, wrote to the Supervisor of the Reno Indian Agency:

> The Office appreciates Mr. Creel's thorough and comprehensive report on this matter and is, of course, disposed to do everything it can to *protect the fish*, not only for the benefit of the Indians, but of the white population as well, *so far as consistent with the larger interests involved in the proposition having to do with the reclamation* of thousands of acres of arid and now useless land for the benefit of the country as a whole. [Ex. U-113 (JA 341); emphasis

[10] Ex. A-99009 at 13. The United States further argued that *Orr Ditch* was brought for the purpose of "adjudicating the rights of the Pyramid Lake Indian Reservation in the Truckee River". Ex. A-11024B at 1.

added. *See also* Ex. U-114 (JA 342); Nev. App. 185a.]

The Indians and all of the necessary Government officials knew of the fishery water request. Though the issue had been identified as a claim that could be litigated in *Orr Ditch*, Government officials had difficult decisions to make regarding what rights to press for, and had to consider many factors, including, at the outset, whether they would be able to obtain any water right at all for an Executive Order reservation. Nev. App. 185a. The Government attorneys remained concerned about obtaining a sufficient irrigation right to the Tribe. Clearly, the decision had been made not to press the case for a discreet fishery water right.

But the decline of the fishery—unlike the possibility of a discreet fishery water right[11]—was well known to everyone. The Newlands Project Manager contrasted the fish at Pyramid Lake with the much more valuable agricultural industry potential there. Ex. A-40196B5 (JA 348-349).[12] Congressman Raker of California was a chief proponent of the survival of the declining Pyramid Lake fishery, and he discussed it numerous times before various Congressional committees and with other departments of the Federal Government.[13] United States Sena-

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[11] The only evidence of such a possibility appears in intra-Governmental memoranda and letters. *See* Nev. App. 191a.

[12] In his report, he noted that in 1871, the value of the fish was approximately $2,000, which had increased to approximately $4,200 by 1884. In contrast, only 400 acres of potatoes grown on Pyramid Lake bottom lands would have yielded $48,000 per year. *Id.* (JA 349). He noted that there was a potential of approximately 3,100 irrigable acres at Pyramid Lake. *Id.*

His final recommendation was that the fishery be permanently protected or maintained for many years, but his caveat was, "depending on ultimate irrigation development." *Id.* (JA 356).

[13] For example, after noting the destruction of fish in the Lake, he wrote:

> * * * *I have had [this subject] up with every official in the State of California* having charge of these matters. *I have had*

tor Oddie of Nevada was also actively involved with the problem.[14]

In 1924, proposed findings were announced in open court. See Ex. A-99005 at 3 (JA 398). The Government's attorney wrote the Attorney General that he was entirely satisfied with the proposed findings and that the United States had prevailed on every legal issue. Ex. A-356 (JA 363).

The Special Master then heard arguments for eight days, relating to the proposed findings and tentative decree (including one exception filed by the United States not relevant here). See Exs. A-99005 at 4 (JA 399), A-356 (JA 364). The Government attorneys had to defend against the differing arguments relating to the separate claims for the Reservation and the Project. Ex. B-484 (JA 366). In defending against objections to the Reservation claims, the Government emphasized that its purpose was to encourage Indians to be self-supporting through pastoral pursuits and cultivation of the soil (Ex. A-99012 at 24 (JA 381-382)), and that the Indians had been required to give up earlier "habits of life, and their customs", and to overcome their "nomadic and wild habits". *Id.* at 23 (JA 381). The *Orr Ditch* defendants

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it up with all officials of the State of Nevada having charge of this subject. *I have had it up with every official in the Federal Government* and my colleague from Nevada has done the same thing * * *. [65 Cong. Rec. 6,671 (1924); *see also* Ex. U-152 (JA 357); emphasis added.]

[14] Senator Oddie met with the manager of the Newlands Project, the manager of the local Indian Agency, sportsmen, and the Supervising Engineer of the Indian Irrigation Services, Department of Interior, to investigate the fish situation. Ex. A-50239B.

On one occasion he told the Congress, after referring to a dam in the Newlands Project blocking the fish from going upstream:

> *I have had this matter up with all the departments*—the Bureau of Fisheries, the Fish and Game Commission of California, and the Fish and Game Commission of Nevada, and the Reclamation Service, and the Bureau of Indian Affairs. [66 Cong. Rec. 206 (1924); emphasis added.]

argued the construction of the phrase "Indian purposes", urging the Special Master to focus on the activities of the Indians in 1859, rather than the Government's aspiration for Indian agriculture. Ex. A-99006.

During this period, the Indians were fully aware of the fishery problem and of the litigation. In 1925, for example, the Indian Agency Superintendent, following a meeting with a delegation of Pyramid Lake Indians, objected to the receding level of Pyramid Lake and the destruction of fish life then occurring. Ex. U-169 (JA 385). He reported to the Commissioner of Indian Affairs the Indians' statement that they "Must have the water to save their fish * * *. *We are under the Government and the Government should protect our rights to this water*, and not allow the water taken away from us. If the water is turned down the fish will come up—that will please all—both Indians and whites—as it would benefit all." *Id.* (JA 387); emphasis added. The Indians suggested that the United States Attorney be asked to stop interference with water that should go to the Reservation. *Id.* (JA 388); Ex. A-10115D.

The Special Master drafted a comprehensive report in that same year, 1925, discussing the proceedings to date, the law, the evidence, and the proposed decree, formulating the cause of action to include all uses and purposes of all the parties. The report stated:

> A decree in this case should allow and fix as a valuable asset for all time every water right involved so definitely that uncertainty and future litigation will be avoided, that every owner will know what he has to use, to sell, or to leave to his heirs, and that every purchaser may feel safe in buying. [Ex. A-99005 at 7, 89 (JA 401-402); *see also* Nev. App. 186a.]

The Special Master prepared a proposed temporary restraining order which was adopted in 1926 by Judge Farrington. Ex. A-99002; Nev. App. at 12a. The order set forth separately the proposed water rights of both the Indians and the Project. Nev. App. 12a-16a. No discreet

fishery water right was provided for. Nevertheless, the Special Master, recognizing the Indians' need for water—particularly for irrigation—upheld the contention of the United States that the Reservation should have a *Winters* right with a priority date of December 8, 1859. *Id.* at 12a. The adoption of the order was regarded by the Government as a victory benefitting the Reservation claims. See Ex. B-138 (JA 421-422). The proceedings were left open for any person affected by the order to apply for its amendment, alteration or modification. Nev. App. 186a.

In the view of Government officials, all that was necessary to protect the fish was a sufficient flow in the river for them to pass upstream during their spawning season. This amounted to a period of a few days in the eyes of some and as much as four weeks in the eyes of others. Though some officials felt that this could be accomplished through accommodation under the rights adjudicated in the temporary restraining order, it was still a matter for the court ultimately to decide.[15]

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[15] Exs. A-10119D, A-20186A, A-20198A, A-20193 (JA 426), A-20204A, A-373, A-5018B, A-90831S. For example, in Ex. A-90805S (JA 424-425), the Superintendent of the Indian Agency wrote Judge Farrington that:

> *I am writing you to find out if some arrangement can be made* to allow the entire flow of Truckee River to run into into Pyramid for a period of about two weeks.
>
> * * *
>
> In past years I believe the United States Reclamation Service arranged to have the entire flow of the River run into Pyramid Lake for a short period in the Spring—the spawning season for fish—but Mr. Richardson, Superintendent of the Newlands Project, informs me that *the turning of the water into Pyramid Lake is now a matter to be handled by the United States Court.*
>
> * * *
>
> The Indians have been asking all winter to have the waters of the Truckee River allowed to flow into the lake for a period of two weeks at this time of the year, and *I trust the justice*

Despite recognition that any fishery right would need *Orr Ditch* action, no effort was made to modify the temporary restraining order. Instead, in a clear statement of Government policy at the time, the Commissioner of Indian Affairs wrote that the Pyramid Lake Indians would be wise to asume that the Truckee River would be used practically all for irrigation and that the Indians, instead of trying to stop such a development, should attempt to make it inure to their benefit. Ex. B-158 (JA 430). After noting specific arguments made by the Indians themselves, including their contentions regarding their fishery (*id.* (JA 433-435)), the Commissioner continued his letter in a vein that bears directly upon the issues in this case:

> The feeling of the Indians that their reservation should be held intact and allowed to remain as it is, is of course understandable. On the other hand if their ultimate welfare depends in part upon their being able to hold their own in a civilized world, * * * *they should look forward to a different means of livelihood, in part at least, from their ancestral one, of fishing and hunting. They should expect not only to farm their allotments but also to do other sorts of work and have other ways of making a living.* This means, of course, that they should also look forward to the day when they will have individual property and to conditions under which it will be impossible for them to maintain their reservation intact and as an isolated domain on which to fish and hunt, graze cattle, and conduct only a few small farms. [*Id.* (JA 436-437); emphasis added.]

The continued decision not to press for a discreet fishery claim, per se, was thus in accordance with a conscious policy decision of the Government. It remained

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of of their request is sufficiently apparent to allow favorable action.

* * *

I shall appreciate whatever you may be able to do * * *.* [Emphasis added.]

however, a claim that could have been raised in *Orr Ditch*. It was also clear that TCID, organized in 1926 pursuant to Nevada Law (N.R.S. Chapter 539) to operate the Newlands Project at arms length with the Government, was not going to participate in a non-judicial adjustment of water for fishery uses at the expense of the Reclamation Project water users. Ex U-205 (JA 439).[16]

On December 18, 1926, less than a year after the entry of the temporary restraining order, a contract was entered into between the United States and TCID whereby the Newlands Project was turned over to TCID. Ex. B-492. Thereafter, TCID was represented by its own counsel (see, *e.g.*, Exs. A-447 (JA 445), B-291 (JA 465), who appeared on behalf of the Project water users in the *Orr Ditch* proceedings. *E.g.*, Exs. B-495, B-496, B-497, B-512, B-515. At least by 1929, the desirability and need for fish hatcheries as a solution to the declining Lake problem was recognized by many. Exs. A-30515H, A-60009F, A-20483A, B-321, A-427 (JA 452), A-506 (JA 471).

The Secretary of the Interior decided to begin negotiations for an agreement that would, in effect, modify the terms of the temporary restraining order on a basis more favorable to the Indian claims and also provide for the entry of a final decree incorporating the terms of the agreement. Exs. B-317, B-318. These efforts bore fruition in 1935, when the United States, TCID, the Sierra Pacific Power Company, the Washoe County Water Conservation District, and most of the *Orr Ditch*

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[16] Continuing problems relating to the fishery and the Lake were well known to various concerned Governmental agencies from the period following the entry of the temporary restraining order in 1926 through the time of the Truckee River Agreement in 1935; yet the decision not to assert a discreet fishery claim in *Orr Ditch* was not disturbed. *E.g.*, Exs. A-50191B (JA 443), U-223 (JA 444), A-20375A, A-60013F, A-20361A, U-233 (JA 450), A-427 (JA 452), B-229 (JA 455).

defendants, after extensive, arms-length and good-faith negotiations, entered into the Truckee River Agreement, which provided, *inter alia*, for the upstream storage of the Truckee River waters, and more water for the Tribe. See Nev. App. 143a-144a.

In that same year, 1935, United States District Judge St. Sure announced his decision in *United States* v. *Walker River Irrigation District*, 11 F. Supp. 158 (D. Nev.). In that case, the Government had not represented interests other than the Tribe's and yet had not sought a fishery right for the Walker River Reservation. The court held that an Executive Order reservation (such as the Pyramid Lake Reservation [17]), was not entitled to any *Winters* implied and reserved water right at all.[18] The decision was reported to the Commissioner of Indian Affairs, along with fears that the result in *Orr Ditch* might be no water rights whatever for the Pyramid Lake Indians. Ex. B-347. Nevertheless, as noted above, Government officials were able to conclude the Truckee River Agreement, assuring the Indians water rights for all land capable of irrigation on their Reservation, although providing no water specifically for fish. As late as 1942, the theoretical possibility of a specific fishery right was still recognized within the Government, but no effort was made to change the Truckee River Agreement or petition the District Court. Ex. U-333 (JA 474).

It was apparent that the attorneys representing the United States felt it was in the interest of the Government and for the protection of Indian rights that steps be taken to finalize, or close, the *Orr Ditch* decree. Attorneys representing TCID wanted the same result (see Exs. U-124 (JA 441), A-447 (JA 445)), and in fact

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[17] The Walker River Reservation was established by the same Government documents as the Pyramid Lake Reservation.

[18] This holding was reversed by the Ninth Circuit Court of Appeals at 104 F.2d 334, but not until 1939, some four years later.

a stipulation had been entered into between the Truckee River Agreement parties, including TCID, for the entry of a final decree. Both the agreement and the stipulation had been approved by the Secretary of Interior and the interested Government bureaus, including the Bureau of Indian Affairs. Nev. App. 186a-187a; Exs. B-291 (JA 465), B-499; TCID App. A110-A184. Therefore, negotiations among the parties went forward in an effort to close the decree. Throughout the negotiations, the efforts of the United States were directed to preserving the Special Master's award for the Reservation and to enlarging the Reservation's irrigation rights. The attorneys for TCID took the responsibility for the rights of the water users of the Reclamation Project, as opposed to those of the United States and the *Orr Ditch* defendants. Exs. U-263, U-265, B-278, U-267, A-60509G1, A-461, U-272, B-291 (JA 465), B-293, U-273, U-277, B-303, U-276, U-278, B-308, A-467, G-29, B-318. The Government was successful in negotiating an enlarged right for the Reservation senior to the rights of the *Orr Ditch* defendants and TCID. Ex. B316.

In 1944, a motion to enter a final decree was set for hearing. Ex. B-512. Counsel for TCID appeared at the hearing for its clients. Ex. B-515. The hearings on objections lasted three days (*id.*), all objections being overruled. District Judge Norcross entered the *Orr Ditch* Final Decree on September 8, 1944,[19] and notice of entry of judgment was thereafter given all parties. Ex. B-516. No motion for a new trial was filed, and no appeal was taken. Nev. App. 188a.[20]

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[19] The Government successfully had the Truckee River Agreement incorporated into the Final Decree. Ex. A-99001 at 86; Nev. App. 143a-144a.

[20] Part of the reason for the delay between 1935 and 1944 was the construction, following approval by Congress, of the Boca Dam in California, which provided additional storage of Truckee River water in accordance with the Truckee River Agreement.

Unlike all other rights set forth in the *Orr Ditch* Decree, the Pyramid Lake Reservation *Winters* right provided for water not only for historic uses, but for future uses. Thus, the Decree provided a water right senior to almost all other rights in the Decree to irrigate not ony land in cultivation on the Reservation, but all lands capable of irrigation. *See* Nev. App. 56a-58a, 75a-141a, 145a.

The Indians themselves were well aware of the *Orr Ditch* litigation during the entire period before the temporary restraining order and up to the entry of a final decree, and of the fact that their rights were being determined. Exs. U-269 (JA 461), U-270 (JA 463), A-464 (JA 467). For example, in 1934 the Pyramid Lake Indian Council wrote to the Commissioner of Indian Affairs, complaining about the shortage of water at the Lake and specifically noting that "this matter has been tied up in courts for some fifteen years, as we recall it * * *." Ex. U-270 (JA 463). In response, the Commissioner pointed out:

> At the present time as you no doubt have been informed, steps are being taken looking to having the temporary order of the court entered in 1926 in the suit entitled United States of America v. Orr Water Ditch Company et al., made final by further action of the court. The Attorney General has been recently advised as to your particular interests in this matter * * *. [Ex. A-464 (JA 467).]

In 1943 the Tribal Council authorized two delegates to travel to Washington, D.C., and represent the Tribe at Congressional hearings. Ex. V-259. Before the House Committee on Indian Affairs, they had with them the *Orr Ditch* temporary restraining order (*see* Nev. App. 12a-16a) and discussed the water rights decreed by the District Court for the Reservation. Exs. U-543, A-605. The chairman of the Tribal Council testified that the Tribe had "no fish at all", that the fishing had "died out", and that he did not want Pyramid Lake to fill up

because that would "take half our irrigated pasture." In fact, the thrust of the testimony of both Tribal delegates before the Committee was that the Indians wanted to be farmers and herdsmen. Ex. U-543 at 26-35 (and especially 28, 33-34, 35).[21]

During the entire period from 1935 to 1944, the decline of Pyramid Lake and the Truckee River fishery was well known not only to the Indians but to the Bureau of Indian Affairs, the Bureau of Reclamation, State and Federal fish and game agencies and agencies, and Nevada's Congressional delegation.[22]

Since the entry of the *Orr Ditch* Final Decree in 1944, both the United States and the Tribe have continuously accepted and enjoyed the benefits of the water rights and priorities decreed, and continue to this day to accept and rely upon them. Neither the United States nor the Tribe has changed its position in any manner based on any assumption that the *Orr Ditch* Decree does not bind them or is in any way invalid. *See* Nev. App. 186a.

The whole civilization of western Nevada, including Reno, Sparks, and all other Truckee watershed areas and the vast agricultural enterprises at the Newlands Project have relied upon the finality and conclusiveness of this

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[21] Early exhibits indicate that Indians on the Reservation numbered about 611. See Exs. U-10 (JA 264), U-12 (JA 273). The Congressional hearings at which representatives of the Tribe appeared and at which the *Orr Ditch* proceedings were discussed reflect that in the time frame 1942-1943, the Tribe was comprised of about 560 Indians, representing 275 adults and 70 families. Ex. U-543 at pp. 9, 24, 25. We do not believe that these figures for the Reservation have materially changed since this latter time period.

[22] Nev. App. 187a; Exs. A-20157A, A-10237D, A-1042L, A-50168B, B-492; Tr. 5512, 5519-21, 5541. *See also* Ex. A-20230A2 (a letter to the Commissioner of Indian Affairs stating that "these Indians have a pretty good claim for damages against the reclamation service and the federal government in the destruction of one of their early and continuous industries").

water Decree. In fact, billions of dollars have been spent in reliance on it. Property has been conveyed, businesses have been built, families have been rooted, improvements have been added, facilities have been installed—all based upon the stability inherent in the Final Decree.[23]

In September 1972, the United States filed in this Court a Motion for Leave to File Complaint in an attempt to establish a *Winters* right specifically for fishery purposes for the Pyramid Lake Reservation. *United States* v. *Nevada*, Original No. 59. This Court declined to exercise its original jurisdiction. 412 U.S. 534 (1973).

Thereafter, in December 1973, the United States filed its Complaint in the instant action in the United States District Court for the District of Nevada. *United States* v. *Truckee-Carson Irrigation District*. Nev. App. 151a. The United States sued in its own right and in its fiduciary capacity on behalf of the Tribe. *Id.* The defendants were some 17,000 owners or claimants to the rights to the use of waters of the Truckee River that were decreed in *Orr Ditch*. *Id.* The Complaint sought a *Winters* right specifically for fishery purposes on behalf of the Tribe, and also sought the adjudication of additional water rights in favor of the United States in its proprietary capacity. The Complaint, like its counterpart in *Orr Ditch*, failed to state affirmatively that the Federal claims were to be adjudicated *inter se*, but nevertheless separately set out the differing claims. The Tribe was granted leave to file a Complaint in Intervention which also sought an adjudication of a discreet *Winters* right for fishery purposes. JA 7, JA 2 The District Court bifurcated the case in order to determine at the outset

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[23] Nev. App. 189a; *see also* JA 258; Exs. A-70002, A-70003, A-70009, A-70101; Tr. 3990-94, 5072-77, 5099-5106; Exs. A-70502, A-70505, A-70508, A-70509, A-70515, A-70518, A-70519, A-70520, A-70524, A-70528, A-70533, A-70534, A-70562, A-70572; Tr. 3998-9, 4007-63, 4062-64; Exs. A-70427, A-70430.

whether the defendants were entitled to the application of res judicata as a bar to the Complaint and the Complaint in Intervention. JA 191. After 43 days of trial, Judge J. Blaine Anderson of the Ninth Circuit Court of Appeals (sitting by designation) ruled that *Orr Ditch* had settled all rights at issue and that therefor res judicata was a defense available to all defendants, including TCID, and was a bar to the *Winters* fishery right claims being asserted by the United States and the Tribe. Nev. App. 161a, 180a.

The Ninth Circuit Court of Appeals affirmed in part and reversed in part, holding that all defendants *except* TCID were entitled to rely upon res judicata. Nev. App. 197a.[24] The majority reasoned that even though the fishery claim could have been raised in *Orr Ditch*, and even though that claim was within the *Orr Ditch* cause of action, the interests of the Tribe and TCID had not been "adverse" on the pleadings. Therefore, the adversity requirement of res judicata was not met. On remand, the District Court was to determine whether a separate fishery right exists. If so, the requirements of that right were to be satisfied from water adjudicated for the benefit of the Reclamation Project. Nev. App. 248a-249a.

Circuit Judge Schroeder dissented from that part of the majority's opinion which refused to apply res judicata to TCID. App. 249a. She pointed out that the majority's technical application of "adversity" requirements based on the pleadings is more applicable to tort litigation than to water rights. She noted several decisions by state courts in the West indicating that in all-inclusive quiet title litigation, because only a limited amount of water is available for distribution, the interests of all parties, how-

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[24] The opinion was subsequently amended by orders dated July 10, 1981 (App. 254a), and January 5, 1982. App. 256a.

ever designated in pleadings, are necessarily "adverse" to each other. Congress has been alerted to these problems, she added, and if any change in the long-standing principle of finality in water adjudication is to be effected, it should be accomplished by Congress rather than the Federal courts.

Petitions for rehearing by the State of Nevada and TCID were denied by a two-to-one vote of the three-judge panel of the Ninth Circuit, and in the same other a majority of all judges voted against an en banc rehearing. Nev. App. 260a.

Both Nevada and TCID petitioned for writs of certiorari. Nos. 81-2245 and 81-2276.[25] The Tribe filed a conditional cross-petition. No. 82-38. This Court granted all three petitions and consolidated them for argument.

SUMMARY OF ARGUMENT

The Court of Appeals was correct as to every party except TCID. The Paiute Indians should not be allowed to relitigate their water rights relative to TCID, since those rights have already been litigated to conclusion in a prior case.

In the *Orr Ditch* case, begun in 1913 and concluded by a Final Decree in 1944, all *Winters* rights to the waters

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[25] Although the Court of Appeals held that the State of Nevada, like the other "Orr Ditch defendants," could assert res judicata under the *Orr Ditch* decree, the State has a number of interests to protect. It acts in its quasi-sovereign capacity to protect the overall interests of all the people and entities in the State. As such, the State believes that the Court of Appeals was in error in failing to allow TCID to take advantage of the doctrine of res judicata, and that the result of a remand reopening the issue of water priorities as between the Tribe and TCID will be detrimental to the State as a whole. Thus, it is in its quasi-sovereign capacity that the State appears as a Petitioner in this Court. *Cf. Colorado* v. *New Mexico*, 51 U.S.L.W. 4045, 4046 n.9 (U.S. December 13, 1982).

of the Truckee River were quantified. This quantification recognized the Indian Tribe's paramount rights, which were agricultural in nature, and allowed for future as well as then-current needs. The Tribe should not now be allowed to circumvent that Final Decree with more water for a fishery.

The same result follows through the application of res judicata and collateral estoppel. First, the interests of TCID and the Tribe were clearly adverse to each other in *Orr Ditch*—in the Complaint, during the proceedings, during negotiations between the parties, and in the Final Decree. The issues actually and necessarily litigated in *Orr Ditch* (including the "Indian purposes" for which their Reservation was established) were the same as those at issue here. To require a formal "adversity on the pleadings" would be to honor form over substance and outmoded pleading procedures. Secondly, the United States, representing the Indians, had a full and fair opportunity to litigate a fishery right in *Orr Ditch*, which was a comprehensive and conclusive, quiet title, water rights adjudication. The United States proved the fact, date, purpose, and amount of all the water to which the Indians were entitled under *Winters*.

There was no denial of due process or conflict of interest on the part of the United States in representing diverse interests in *Orr Ditch*. As part of its role as a fiduciary, the United States must often represent such interests, and a holding that this was improper would call in question the traditional role of the United States in water rights litigation, in cases involving Indians, and in other cases as well.

A failure to reverse as to TCID will bring about incalculable hardships to the thousands of landowners, families, and businesses that have built their livelihood and based their future on the *Orr Ditch* Final Decree.

ARGUMENT

I. THE *WINTERS* RIGHT QUANTIFICATION IN *ORR DITCH* SHOULD NOT BE DISTURBED.

In *Winters* v. *United States*, *supra*, 207 U.S. 564, this Court held in 1908 that when the United States reserved by treaty certain lands in Montana for use and settlement by Indians, it also by implication reserved a right to appurtenant water in quantities sufficient to irrigate that land. In *Winters*, as in *Walker River* and *Orr Ditch*, to cause the Indians to give up their nomadic and uncivilized habits and become a pastoral and civilized people through agriculture. Though in *Winters* the treaty did not expressly reserve water rights, the Court implied an irrigation water right sufficient for the Indians' civilized needs.[26]

The Court has held that the *Winters* doctrine reserves "only that amount of water necessary to fulfill the purpose of the reservation, and no more." *Cappaert* v. *United States*, 426 U.S. 128, 141 (1976).[27] In the same vein, the Court has differentiated between necessary and secondary uses intended for federal reservations of land, and has held that implied reservations of water only encompass quantities needed to effectuate the former. *United States* v. *New Mexico*, 438 U.S. at 702.

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[26] The Court has further clarified this doctrine to make it clear that it applies to reservations created by executive order as well as treaty, and that the water is reserved for present and future uses. *Arizona* v. *California*, 373 U.S. 546, 598, 600-601 (1963). *See also United States* v. *Walker River Irrigation District*, *supra*, 104 F.2d 334.

[27] *See Arizona* v. *California*, 373 U.S. at 595-601; *United States* v. *District Court*, 401 U.S. 520, 522-523 (1971); *Colorado River Water Cons. District* v. *United States*, 424 U.S. 800, 805 (1975); *see also United States* v. *Walker River Irrigation District*, 104 F.2d at 336 ("In the *Winters* case, as in this, the basic question for determination was one of intent * * *.")

A definitive quantification of *Winters* rights aids in fostering the prosperity of the Western areas.[28] In fact, quantification is essential because, as this Court has said, "When * * * a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators". *United States* v. *New Mexico*, 438 U.S. at 705.[29] In *Arizona* v. *California*, 373 U.S. at 600-601, the Court rejected Arizona's proposed measurement technique based on popula-

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[28] The Court has recognized the vital importance of water supply to the economy of our Western states. *Colorado River Water Cons. District* v. *United States*, 424 U.S. at 804. The commentary on the *Winters* line of cases stresses the need for certainty of water supply for adequate economic and other planning and development in the region. *See, e.g.*, Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J.L. & Econ. 41, 47 (1959); Note, *Indian Reserved Water Rights: The Winters of Our Discontent*, 88 Yale L.J. 1689, 1629-94 (1979); Note, *A Proposal For the Quantification of Reserved Indian Water Rights*, 74 Colum. L. Rev. 1299, 1304-05 (1974).

The cases in which this Court and other tribunals have elaborated on the *Winters* doctrine have involved initial quantifications of water reservations. In the instant case, however, the Tribe's *Winters* rights were quantified nearly forty years ago, in the *Orr Ditch* Final Decree.

This Court has made clear that a "balancing of equities" analysis is inappropriate in establishing an initial quantification of *Winters* rights. *Cappaert* v. *United States*, 426 U.S. at 138-139. Once a quantification has been arrived at, however, the situation is much different, for then there is, as here, justified reliance by non-Indians over a substantial period of time on the availability of water as provided in the Final Decree. The interests of the non-Indian parties merit substantial consideration in such a context.

[29] The need conclusively to quantify a reserved right is particularly important in the arid parts of the West because federal reservations vie with other public and private claims for the limited quantities of water available. As the court observed in *New Mexico*, 86.5% of the land in the State of Nevada is federally owned, excluding Indian reservations and other trust properties. 438 U.S. at 699 n.3.

tion because it involved too much guess-work. Rather, the Court applied an "irrigable acreage" measurement—a measurement that permitted the establishment of a firm quantum of water (since the acreage is constant) while allowing for future needs by including irrigable as well as then-irrigated acreage.

Thus, the requirement that a quantified *Winters* reservation should allow for future needs of the Tribe does not mean that the Tribe may obtain modification of such a decree on an incremental basis as the decades go by.[30] So long as the initial quantification recognized the Tribe's paramount rights and allowed for future as well as then-current needs—such as occurred here—the *Winters* doctrine has been satisfied.

II. THE DOCTRINE OF *RES JUDICATA* PROTECTS ALL THE DEFENDANTS IN THIS CASE.

A. Introduction.

The courts long ago fashioned the doctrines of res judicata and collateral estoppel for sound purposes, which are threatened by the Ninth Circuit's decision in this case. Maintaining the finality of judgments benefits the courts by encouraging public confidence in judicial resolution of disputes and deterring parties from crowding the dockets with repetitious lawsuits. The principle also aids the public: protecting parties from vexatious relitigation of settled matters and from the risk of inconsistent rulings, it enables parties and others to act in reliance on court judgments.[31]

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[30] The one case that endorses the concept of modfiable decrees, *Conrad Investment Co.* v. *United States*, 161 F. 829 (9th Cir. 1980), involved a decree that by its terms provided for future modification. *Id.* at 835. As already shown, the *Orr Ditch* Final Decree, by contrast, was intended to be final.

[31] *See Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401-402 (1981); *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois*

All the defendants in the present case rely on the defense of res judicata. *E.g.*, JA 58, 94, 121, 191. Under that doctrine, when a court of competent jurisdiction has rendered a final judgment on the merits of a cause of action, the parties to the lawsuit and their privies are precluded from relitigating any claim of law or fact that they raised or should have raised in the initial proceedings.[32] Both courts below found that the United States and the Tribe are bringing the same quiet title action here that was asserted in *Orr Ditch* on behalf of the Tribe—that is, a *Winters* implied and reserved water right for the benefit of the Reservation, with a priority date of December 8, 1859, from a single source of water (the Truckee watershed). Nev. App. 188a, 224-226a. Both courts likewise found that in a comprehensive adjudication the United States may not litigate several different types of water use claims, all arising under the *Winters* doctrine, and all derived from the same source, in a piecemeal fashion. *Id.*

Having correctly upheld the res judicata bar to the present action as against the *Orr Ditch* defendants and subsequent appropriators, the Court of Appeals then

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Found., 402 U.S. 313, 328-329 (1971); *Southern Pacific R.R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897); *Developments in the Law —Res Judicata*, 65 Harv. L. Rev. 818, 820 (1952); Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 Mich. L. Rev. 1723, 1724 (1968); 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.405[1], at 628-630 (2d ed. 1982 & Supp. 1981-82) (hereinafter Moore's Federal Practice); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4403 (1981 & Supp. 1982) (hereinafter Wright & Miller).

[32] *E.g.*, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. at 398; *Montana* v. *United States*, 440 U.S. at 153; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319-320 (1927); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1876). *See generally* 1B Moore's Federal Practice, *supra* note 31, ¶¶ 0.405-0.419; 1 Restatement (Second) of Judgments §§ 17-26 (1982); Restatement of Judgments §§ 45-67 (1942); 18 Wright & Miller, *supra* note 31, §§ 4402, 4406-4415, 4427-4462.

made one error. Reversing the District Court, the Court of Appeals ruled that unlike the other defendants in this case, TCID could not raise the res judicata defense on behalf of the farmers in the Newlands Reclamation Project. Nev. App. 244a-245a. The court reasoned that because TCID and the Tribe both had been represented by the United States in *Orr Ditch* and had not been "adversaries under the pleadings" (*id.* at 242a), TCID could not invoke claim preclusion against the United States and the Tribe in the present case. *Id.* at 244a-245a. The court held, moreover, that TCID could not even assert collateral estoppel against the Tribe because the Tribe's asserted fishery water right was not actually litigated in *Orr Ditch*. *Id.*

The Court of Appeals' rejection of TCID's res judicata defense rests on a technical concept of adversity which, as Judge Schroeder pointed out in dissent (*id.* at 249a-250a), does not ring true in an equitable water rights adjudication such as *Orr Ditch*. The fine line drawn by the Court of Appeals places form over substance and completely ignores the strong public policy favoring finality in judgments, particularly in connection with real property quiet title decrees from which public reliance is fundamental to the purpose of the particular litigation. *Montana* v. *United States*, *supra*; *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472 (1924); *see also United States* v. *New Mexico*, *supra*. The reliance on outmoded rules of pleading no longer has a place in the modern application of res judicata.

B. There Was "Adversity Under The Pleadings" in the *Orr Ditch* Amended Complaint.

As a fiduciary, the United States had full authority to bring the *Winters* rights claims for the Indians in *Orr Ditch* and bind them in the litigation. *Heckman v. United States*, 224 U.S. 413 (1912). The United States was also obligated to put forth all other claims that it had to the use of the Truckee River, because the failure to

do so would bar the United States in all its capacities under the doctrine of res judicata. In *United States* v. *California & Oregon Land Co.*, 192 U.S. 355 (1904), this Court ruled that when the United States brings a quiet title action, it must do so in all of its capacities or be bound by res judicata on any other claim within the same cause of action. And *Heckman* made clear that when the United States litigates on behalf of its Indian wards, that representation is complete, and those who litigate with the United States can do so with the assurance that the outcome of the litigation will not be subject to a subsequent attack in connection with the same cause of action.

The United States did not plead for a single water right for itself, which it could allocate between the Reservation and Reclamation Project. Instead, it stated in separate and distinct paragraphs of the pleading the different quantities of water, places of use, means of diversion, and priorities for the two claims. Nev. App. 2a-8a. Each claim depended on its own merit and evidence. Each claim was to become appurtenant to different lands. *See Ickes* v. *Fox*, 300 U.S. 82 (1937).

Thus, Paragraph 18 of the Amended Complaint identified the Governmental objective of determining the *several* rights of all claimants, including the United States, and also identified the objective of avoiding a multiplicity of suits. Nev. App. 10a. The Amended Complaint sought a determination of the relative, plural, rights of the parties "to the end that it may be known how much of said water may be diverted from said river by the parties hereto and for what purposes, where, by what means of diversion, and with what priorities." Nev. App. 10a.

For the foregoing reasons, the Court of Appeals erred by not concluding that the Amended Complaint demonstrated the adversity under the pleadings that it thought essential to a res judicata determination. Reversing the District Court because the United States failed affirma-

tively to place language in the Amended Complaint to state that its claims were to be determined *inter se* would be to require redundantly and place form over substance to an unprecedented decree.

C. The *Orr Ditch* Proceedings Demonstrate the Sufficiency of the Pleadings.

The sufficiency of the pleadings is even more evident when placed in the context of the intention and objectives of all concerned with the *Orr Ditch* litigation. Nev. App. 185a; *see also id.* at 145a, 225a.

The United States argued, for example, the need to dispense with pleading technicalities so as to bind each right determined in the decree *inter se* with every other right.[33] The *Orr Ditch* court agreed that every claim was interdependent and had to be determined on a right-by-right basis, irrespective of any technical deficiency in the pleading.[34] Though Judge Farrington's ruling was directed at the pleadings of the co-defendants, the positions taken by the United States could only mean that it had considered its pleading sufficient to obtain the *inter se* determination of its claims against all other claims.

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[33] As set out in our Statement of the Case, the Government's attorney wrote the trial court in 1918 that it should bring in every claimant because the "water supply is to be divided and apportioned between a number of persons, each of whom claims rights adverse to, but contingent and interdependent upon, the right of the others, equity will not dispose of this res by piecemeal, but as a whole; which means the determination of the rights and priorities of each user." Ex. A-99008 (JA 288).

[34] Anticipating the question of res judicata, the trial judge wrote that "where an issue has been fairly tried and determined, *though not formulated in the pleadings*, as between the co-defendants the decree concludes and estops all parties to the cause who have actually joined in litigating the issue, *or who have had an opportunity to say and prove all they can in relation to it.* * * * It is desirable that the present litigation shall *finally settle all controversies* over the waters of the Truckee River * * *." Ex. A-99037 (JA 304, 308-309); emphasis added.

The *Orr Ditch* defendants, recognizing the adversity of all claims, objected on separate grounds to the senior Reservation claims and the junior Reclamation Project claims. Ex. B-484 (JA 366).[35] Moreover, the Government's support of the Special Master's report and the temporary restraining order demonstrates the Government's public intention of having the rights for the Reservation and for the Reclamation Project separately decreed, with a precise determination of the quantities of water, the place of use, the points of diversion, the priority of right and the purpose for which the water could be utilized. *See* Ex. B-138 (JA 421); Nev. App. 122a-162a.[36] The Government's position was carried through in the Truckee River Agreement and the stipulation for entry of the Final Decree, and in the Trial Decree itself.[37]

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[35] TCID had separate counsel and was afforded court recognition as a party in the case. Exs. B-495, B-496, B-497, B-512, B-515.

[36] Thus, individual defendants with multiple claims having differing priorities and places of use had to have those rights separately determined. *E.g.*, Claims 109 and 193, Nev. App. 76a, 83a. Certainly the subsequent purchaser of the land which has water right 109 appurtenant to it has no claim to water right 193, yet the Court of Appeals decision apparently would leave open a lawsuit as between those claims.

[37] The injunction portion of the decree was drafted so that its full sweep would reach not only parties, persons, corporations, intervenors, grantees, successor-trustees in interest, and substituted parties named in the action, but also "all persons claiming by, through, or under them and their successors in and to the water rights or lands" mentioned or described in the decree. Nev. App. 1452. Even though the decree adjudicated the Indian and Reclamation Project rights in the name of the United States (Nev. App. 56a-59a), the *Orr Ditch* injunction operated to carry out the intention, beginning with the pleadings, that the interests ultimately claiming through or under the representation of the United States (the Indians and the Newlands Project landowners) would nonetheless be bound by the separate rights as determined in the decree.

D. Even if Adversity Under the Pleadings is Lacking, *Res Judicata* Binds the Inherently Adverse Claimants in a Comprehensive Equitable Water Rights Adjudication.

"It is elementary, of course, that in any judicial proceeding, the arrangement of the parties on the record, so long as they are adverse, * * * is of no consequence." *Chicago, R.I. Pac. Ry. Co.* v. *Schendel*, 270 U.S. 611, 615 (1926). This Court long ago recognized that particularly in equitable proceedings such as *Orr Ditch*, the technicalities of pleading are irrelevant to the establishment of adversity. *Corcoran* v. *Chesapeake & Ohio Canal Co.*, 94 U.S. 741 (1877).[38] Even the Restatement of Judgments recognized this exception to its general requirement of ad-

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[38] In *Corcoran*, the canal company had issued a series of revenue bonds secured by mortgages given to the states of Maryland and Virginia. *Id.* at 741. When the canal company defaulted, Virginia sued Maryland, the canal company, and Corcoran as trustee for the bondholders to determine the priorities of the rights to the revenues from the canal. *Id.* at 743-744.

Corcoran later attempted to bring a suit in equity against the canal company and Maryland to enforce payment of interest to the bondholders. *Id.* at 742. Corcoran maintained that he, "the canal company, and the State of Maryland, were all defendants to [the first] suit, and that as between them no issue was raised by the pleadings on that question, and no adversary proceedings were had." *Id.* at 744. This Court held that notwithstanding that lack of technical adversity, the earlier action barred Corcoran's suit.

The Court held:

> The answer is, that in chancery suits, where parties are often made defendants because they will not join as plaintiffs, who are yet necessary parties, it has long been settled that adverse interests as between co-defendants may be passed upon and decided, and if the parties have had a hearing and an opportunity of asserting their rights, they are concluded by the decree as far as it affects rights presented to the court and passed on by its decree. [*Id.*]

Accord, Louis v. *Brown Township*, 109 U.S. 162, 167-168 (1883).

versity on the pleadings as a prerequisite to claim preclusion.[39]

This acknowledgement of the adversity of all interests in equitable proceedings has particular force in water rights adjudications. This Court has recognized that "[i]n the arid parts of the West, * * * claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western states * * *." *United States* v. *New Mexico*, 438 U.S. at 699.[40]

The courts of the Western states most familiar with the problems of water resource management also often have expressed the inherent adversity among the users

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[39] The Restatement provides:

c. Suits in equity. In many proceedings the defendants are necessarily adverse parties. This is true in interpleader proceedings in which the interests of the defendants in the fund are necessarily adverse. In other proceedings in equity ordinarily the pleadings can be so framed that issues between the defendants are raised and where this is true one may be an adversary party to another. [Restatement of Judgments, *supra* note 32, § 82, Comment *c*.]

[40] When water is to be divided up, said the Court,

> "[e]ach claimant is * * * directly and vitally interested, not only in establishing the validity and extent of his own claim, but in having determined all of the other claims." * * * In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes * * *. [*Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 449 (1916), quoting *In re Silvies River*, 199 F. 495, 502-503 (D. Or. 1912).

Accord, *Colorado River Water Cons. District* v. *United States*, 424 U.S. at 819; *see* 6 Waters and Waters Rights § 512 at 295-296, § 513.2 at 304 & n. 80, § 530 at 504-506 (R. Clark ed. 1972 & Supp. 1978).

of a common source of water.[41] Similarly, many state supreme courts have held that in water rights and like cases all nonappealing parties are nevertheless "adverse" parties on whom an appellant must serve notice of appeal.[42]

Judge Schroeder, dissenting as to TCID, emphasized that *Orr Ditch* constituted just such an all-inclusive water rights proceeding. Nev. App. 249a-252a. The Government's complaint set forth the claims of the Newlands Project farmers and the Tribe, and the numerous defendants answered with their own claims. As Judge Scroeder succinctly stated, "In such litigation, the fact that claimants may be denominated plaintiffs or defendants has no effect on the application of res judicata. All are adverse to each other." Nev. App. 250a.

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[41] In *Morgan* v. *Udy*, 58 Idaho 670, 680-681, 79 P.2d 295, 299 (1938), for example, the Idaho Supreme Court held that a previous water rights adjudication was res judicata even though the parties in *Morgan* had not been "adversaries" in the earlier action. *See also City of Pasadena* v. *City of Alhambra*, 180 P.2d 699, 714-715 (Cal. Dist. Ct. App. 1947), *modified on other grounds*, 33 Cal.2d 908, 207 P.2d 17 (1949) (en banc), *cert. denied*, 339 U.S. 937 (1950), *In re Chewaucan River*, 89 Ore. 659, 171 Pac. 402, 403-404, *appeal dismissed*, 89 Ore. 668, 175 Pac. 421 (1918); 6 Waters and Waters Rights, *supra* No. 40, § 513.2 at 304 & n. 80.

[42] In one such case the Nevada Supreme Court reasoned:

> Counsel * * * insist that the reversal or modification of the portions of the decree appealed from would not affect the adjudicated rights of the nonappealing defendants. Therefore, they are not "adverse parties" entitled to notice of appeal. The decree fixes the duty of water as between all the contestants. It quiets the title of all adverse claimants to the use of the water. The reversal or modification of the parts or portions of the decree appealed from applies to all the adjudications affecting the use of the water, made the subject of the suit. Its reversal or modification would necessitate a retrial of the case and throw open to readjudication the rights of all the contestants. [*Pacific Live Stock Co.* v. *Ellison Ranching Co.*, 52 Nev. 279, 298 286 P. 120, 124 (1930).]

See generally Annot., 88 A.L.R. 419 (1934 & Supps. 1-5).

Finally, as the dissent also pointed out, if this time-honored principle—developed by those Western state courts which must deal every day with problems of water rights adjudication—is now to be amended in a fashion that erodes finality, surely that amendment should be carried out by an act of Congress rather than by a Federal Court of Appeals. This is particularly true where the matter has been specifically drawn to the attention of Congress, which has chosen to date not to act. See Nev. App. 252a-253a.

E. The Truckee River Agreement Negotiations Provided Further Evidence of Factual Adversity.

After TCID was established in 1926, its counsel represented the interests of the Reclamation Project, and the Government attorneys and officials directed their efforts to obtaining the best possible result for the Indian Reservation. Exs. U-262, U-263, U-265, U-266, B-278, U-267, A-60509G1, A-461, U-272, B-291 (JA 465), B-293, U-273, U-277, B-303, U-276, U-281, U-278, B-308, A-467, G-29, B-318. The Government was ultimately successful in negotiating an enlarged right for the Reservation senior to the rights of the *Orr Ditch* defendants and TCID. Ex. B-316. As the District Court recognized, the negotiations between TCID and the Government were arms-length (Nev. App. 186a), and the enlargement of the right declared for the Reservation in the temporary restraining order was the subject of opposition from TCID's attorneys, until acquiescence proved necessary to obtain the settlement. Exs. U-294, U-295, U-296, A-467, G-29, B-316, B-337. Had there been any defect in the *Orr Ditch* pleading, it was cured by the in-depth, successful arms-length representation by the United States of the Indian interests which provided the basis for the Final Decree.[43]

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[43] The Indians were advised of the Government's efforts to obtain a final and enlarged irrigation right for the Reservation (Ex. A-464 (JA 467)), and the good faith or motives of the Government attor-

F. The Issues Actually and Necessarily Determined in *Orr Ditch* Afford TCID Preclusion from the Fishery Claim.

As noted by the Court of Appeals, adversity under the pleadings is not necessary as to claims actually or necessarily litigated in *Orr Ditch*. Res judicata is therefore available to TCID because the *Winters* right entitlement for the Reservation was fully litigated as part of the *Orr Ditch* cause of action. Furthermore, the determination in *Orr Ditch* of the "Indian purposes" for which the Reservation was established is a basis to support the actual litigation exception to "adversity under the pleadings". The following discussion of litigated matters in the context of collateral estoppel also demonstrates that the need for adversity under the pleadings was obviated in *Orr Ditch*.

Because the plaintiffs had a full and fair opportunity to litigate all of their water rights claims in *Orr Ditch*, and because the issues actually litigated in *Orr Ditch* are

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neys in the *Orr Ditch* litigation have never been challenged by the Tribe. Nev. App. 190a.

During the time TCID was representing its own interests in the litigation and in the Truckee River Agreement negotiations, the Bureau of Reclamation was not attempting in any way to influence the positions being taken by the Commissioner of Indian Affairs or his subordinates in respect to the nature or extent of the rights claimed for the Reservation. Ex. B-291 (JA 465). Indian Affairs was fully aware of the possible claim for a fishery right for the Reservation and specifically determined that the claim should not be raised to support any different *Winters* right claim than was being advanced by the Government attorneys. Exs. U-101 (JA 322), U-106 (JA 335), A-30196H, U-113 (JA 341), U-114 (JA 342), B-158 (JA 430), U-33 (JA 474).

The Government was successful in every claim it sought to make on behalf of the Tribe, notwithstanding the serious doubt that existed as to whether there was any reserved right available for an Executive Order Reservation. Nev. App. 185a. Its good faith was further demonstrated by its stance in the *Walker River* case, where it represented no other interests but still chose not to seek a fishery right.

the same as the issues in the present case, collateral estoppel also prevents the Tribe from now asserting its claim to a fishery water right.[44]

Collateral estoppel serves the same purposes as res judicata, but prevents relitigation of issues, rather than claims. Thus, once the parties to a lawsuit have litigated an issue of fact or law, and a court of competent jurisdiction has determined the issue in a final judgment on the merits, neither party may raise that issue in a subsequent lawsuit between them, even though the second lawsuit is based on a different cause of action.[45] In addition, within the bounds of fairness, a litigant who was not a party to the first action may invoke issue preclusion against a party to the first suit in subsequent litigation between them.[46]

The Ninth Circuit, holding that res judicata protects the *Orr Ditch* defendants and subsequent appropriators, did not need to reach the question whether collateral estoppel also would apply to them. The Court of Appeals, however, rejected all of TCID's res judicata defense and then erroneously failed to make collateral estoppel available.

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[44] The District Court found that the Tribe had the actaul and legal ability and capacity to intervene in *Orr Ditch*. Nev. App. 186a.

[45] *See Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 593 (1974); *Commissioner* v. *Sunnen*, 333 U.S. at 597-598; *Southern Pacific R.R. Co.* v. *United States*, 168 U.S. at 48-49. *See generally* 1B Moore's Federal Practice, *supra* note 31, ¶¶ 0.441-0.448; 1 Restatement (Second) of judgments, *supra* note 32, §§ 27-28; Restatement of Judgments, *supra* note 32, §§ 68-72, 93-111; 18 Wright & Miller, *supra* note 31, §§ 4416-4426.

[46] *See Standefer* v. *United States*, 447 U.S. 10, 21-25 (1980); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 331 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. at 349-350. *See generally* 1 Restatement (Second) of Judgments, *supra* note 32, § 29; 18 Wright & Miller, *supra* note 31, §§ 4463-4465.

The Court of Appeals reasoned that because the farmers and the Tribe had not been adversaries under the pleadings in *Orr Ditch*, TCID could prevent the plaintiffs from raising in the present case only issues actually litigated in *Orr Ditch*. Nev. App. 240a-245a. The court's reliance on the need for actual litigation between non-adversaries as a prerequisite to collateral estoppel rests on an outmoded view. Even if actual litigation were necessary, moreover, the court misconceived the issues actually litigated in *Orr Ditch*.

a. *Plaintiffs Had a Full and Fair Opportunity to Litigate Their Water Rights Claims in* Orr Ditch.

Over the years this Court and numerous courts of appeal have indicated that collateral estoppel in a second action between parties who were not adversaries in a prior lawsuit should depend primarily, not on whether the parties actually litigated the issue between them in the first action, but on whether the party to be precluded had the incentive and opportunity to contest the issue in the earlier case.[47] Thus, in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, *supra*, this Court posed the question "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." 402 U.S. at 328. Answering no, the Court there permitted the defendant, who had not been party to the first action, to invoke collateral estoppel against the plaintiff, who previously had argued the issue and lost. *See id.* at 350. Subsequently, this Court has ruled that, conversely, a plaintiff may take the offensive and use issue preclusion to establish his case against a defendant who, after a full and fair opportunity to litigate the

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[47] *See generally* Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 27 (1964); Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L. Rev. 464 (1981); Note, *Collateral Estoppel of Nonparties*, 87 Harv. L. Rev. 1485 (1974).

isue, obtained an adverse decision. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 326-333.

Even before the decisions of this Court in the last decade, several courts of appeal had held that coparties who had not been formal adversaries on the pleadings in the first action nevertheless could invoke collateral estoppel in a second action between them as to issues that they earlier had had an opportunity to contest.[48] The previously-noted recent decisions of this Court abandoning the requirement of mutuality for collateral estoppel have given new momentum to the view that collateral estoppel depends not on formal adversity and actual liti-

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[48] *See Diamond Shamrock Corp.* v. *Lumbermens Mutual Casualty Co.*, 416 F.2d 707, 710 (7th Cir. 1969); *Livesay Indus., Inc.* v. *Livesay Window Co.*, 202 F.2d 378, 382 (5th Cir.), *cert. denied*, 346 U.S. 855 (1953); *National Bondholders Corp.* v. *Seaboard Citizens Nat'l Bank*, 110 F.2d 138, 144 (4th Cir. 1940).

For example, in *National Bondholders Corp.*, a mortgagor, seeking to refinance his debt, delivered funds to his title company on its assurance that the trustee of the deed of trust would accept early repayment. 110 F.2d at 140. The title company, however, failed to deliver the funds to the trustee, *Id.* Subsequently, the insurance company that had refinanced the debt sued the mortgagor to recover its loan and also sued the title company, the trustee, and the guarantor of the first loan to remove the cloud upon the title. *Id.* at 141. On the dispositive issue, the jury found that the title company had acted as the trustee's agent in accepting repayment of the loan. *Id.* at 142. Accordingly, title was cleared, and the insurance company was permitted to foreclose. *Id.* Thereafter, the guarantor of the first loan sued the trustee of the first deed of trust to recover the value of the loan. *Id.*

The Court o fAppeals ruled that the first judgment precluded relitigation of the agency issue. *See id.* at 145. The court held that "where some finding of fact is made in the first suit which is an essential element in a claim or action subsequently brought by one [coparty] against the other," that finding binds the coparties in subsequent litigation between them. *Id.* at 144. Thus, although the guarantor and the trustee had been coparties in the first case and had not contested the agency issue between each other by way of pleading or during trial, the guarantor could invoke collateral estoppel against the trustee in the later action.

gation between coparties but on a full and fair opportunity to have an issue resolved in court.[49]

It is this establisehd and growing approach to collateral estoppel that the Court of Appeals should have applied in the present case. Although the farmers and the Tribe were not *named* as adversaries on the pleadings in *Orr Ditch*, their claims were opposed. We have seen, moreover, that in *Orr Ditch*, plaintiffs had a full and fair opportunity to assert their interests in the Truckee River. Accordingly, collateral estoppel precludes plaintiffs from raising a claim for a fishery water right in the present action.

b. *The Issues in This Case Were Actually Litigated in* Orr Ditch.

Even if the Court of Appeals correctly required the actual litigation of issues as a prerequisite to collateral estoppel, TCID still can prevent litigation of the question of a reserved fishery water right in this case. The Court of Appeals' decision to the contrary rests on a misconception of the issues actually litigated in *Orr Ditch*.

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[49] *See Oldham* v. *Pritchett*, 599 F.2d 274, 278-281 (8th Cir. 1979); *Scooper Dooper, Inc.* v. *Krafteo Corp.*, 494 F.2d 840, 844-846 (3d Cir. 1974).

In *Scooper Dooper*, the Third Circuit demonstrated that the abandonment of the mutuality requirement for collateral estoppel is the death-knell of the requirement of formal adversity between coparties:

> [T]his Circuit's nullification of the mutuality requirement renders non-adversity irrelevant to the doctrine of collateral estoppel. In this Circuit, a total stranger to a prior litigation may, in a subsequent suit, estop a party from re-litigating a claim which he lost in the prior controversy, provided that the initial opportunity was full and fair. We see no reason to treat a co-plaintiff more harshly than a total stranger. [494 F.2d at 845.]

See generally Developments in the Law—Res Judicata, *supra* note 31, at 860-861; 18 Wright & Miller, *supra* note 31, § 4450; Annot., 24 A.L.R. 3d 318 (1969 & Supp. 1982).

The traditional approach to collateral estoppel, which the Court of Appeals employed, has been that nonadversaries can prevent the reopening of issues that they actually litigated in an earlier action.[50] In order to determine whether a party can invoke collateral estoppel, the court must determine what "issues" were litigated in the first case.[51]

The Court of Appeals did not carefully consider the question of the identity of issues between *Orr Ditch* and the present case. Rather, the Court simply quoted the District Court's finding that the parties had not actually litigated the question of a reserved fishery water right in *Orr Ditch* and therefore concluded that TCID could not collaterally estop the plaintiffs from making the claim in the present case. *See* Nev. App. 244a-245a. Further examination of the issues litigated in *Orr Ditch*, however, reveals that the District Court finding is legally irrelevant.

As we have demonstrated, *Orr Ditch* was a comprehensive and conclusive water rights adjudication. In claim-

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[50] *E.g.*, *Ohio Casualty Ins. Co.* v. *Gordon*, 95 F.2d 605, 609 (10th Cir. 1938); *Fidelity & Casualty Co.* v. *Federal Express, Inc.*, 136 F.2d 35, 38 (6th Cir. 1943); 1 Restatemet (Second) of Judgments, *supra* note 32, § 38; Restatement of Judgments, *supra* note 32, § 82 & Comment a.

[51] *Montana* v. *United States*, 440 U.S. at 155; *Starker* v. *United States*, 602 F.2d 1341, 1344 (9th Cir. 1979). The Restatement (Second) of Judgments culls out four considerations for deciding this question:

> Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings? [Restatement (Second) of Judgments, *supra* note 32, § 27, Comment *c*.]

ing *Winters* rights for the Indians in the *Orr Ditch* proceeding, the United States proved the fact, date, purpose, and amount of its reservation. The present case involves substantially the same evidence and argument, and application of the same rule of law. The claim for water rights for a fishery is not merely closely related to the *Winters* rights claimed in *Orr Ditch*—it is subsumed by them. The issues in this case, therefore, were actually litigated in *Orr Ditch*.

The specific Federal purpose or purposes in establishing the Pyramid Lake Reservation were at issue, were litigated, and were actually determined in *Orr Ditch*. Moreover, just as in the *Walker River* case the proceeding focused on the historical documents which included references to fishing and focused on the phrase "Indian purposes". The *Orr Ditch* defendants were opposed to the Government's 1859 priority date and to the reservation of water for an agricultural economy, contending that in 1859 the Indians were not seriously engaged in farming.[82] The Special Master and the court, however, sustained the Government's argument. Ex. A-99005 (JA 402-404); Nev. App. 12a-13a, 56a-57a.

Because the United States litigated the purpose of the Reservation for which water was reserved, and the court determined the issue in favor of irrigation, collateral estoppel bars the relitigation of purpose—the threshold inquiry in a reserved right case. It is of no consequence that the Government did not seek to quantify a discreet fishery claim, because no primary fishery purpose was

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[82] In arguments over exceptions to the Special Master's findings, counsel for some of the *Orr Ditch* defendants asked in open court: "[t]he question is, Your Honor, for what Indian purposes? What did it mean? What did it mean in 1859 when there was no irrigation being carried on by the Indians?" Defense counsel quoted from the Goverment's brief (Ex. A-99012 (JA 376)), which discussed the national duty to the Indians in view of their having been forced to give up their habits of life and customs in order to overcome their nomadic and wild habits, and the duty to allot them farms sufficient to produce a living.

established. This failure in proof operates as a collateral estoppel bar to the determination of the same threshold issue as the Ninth Circuit has ordered on remand, namely, a determination of the purposes of the Reservation. Nev. App. 248a. Collateral estoppel precludes the plaintiffs from severing the issue of a reserved water right for a fishery from the general assertion of *Winters* rights in *Orr Ditch*. *See Starker* v. *United States*, 602 F.2d at 1344-1345; 1 Restatement (Second) of Judgments, *supra* note 32, § 27, Reporter's Note.

This analysis, moreover, reveals a fundamental inconsistency within the Court of Appeals' decision. The Court of Appeals' conclusion that the issue of a reserved fishery water right was not actually litigated in *Orr Ditch* conflicts with its correct determination that the cause of action in the present case is part of the cause of action asserted in *Orr Ditch*. *See* 1 Restatement (Second) of Judgments, *supra* note 32, § 27, Reporter's Note. Plaintiffs can no more split the issue of fishery water right from the general bar of collateral estoppel than they can maintain a separate cause of action on that claim.

III. THE *ORR DITCH* DECREE IS NOT TAINTED BY A CONFLICT OF INTEREST ON THE PART OF THE UNITED STATES AND DID NOT DENY DUE PROCESS.

The core of the position taken by the Tribe before the Court of Appeals and again before this Court is that it was denied due process of law by the impermissible representation accorded the Tribe by the United States in the *Orr Ditch* proceeding.[53]

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[53] Although the body of the Tribe's Cross-Petition was peppered with references to an alleged denial of due process, its Question Presented made no reference to due process, to the United States Constitution, or to any Article or Amendment thereof. The Tribe is therefor precluded from arguing a constitutional principle. Rule 21.1(a) of the Rules of this Court. The record presents none of the exceptions to this Rule noted in Stern & Gressman, *Supreme Court Practice* (5th ed.), pp. 456-461, and the cases there cited.

We will show in our brief in response to the Tribe's brief on the merits in No. 82-38 that the representation by the United States was entirely proper, both factually and legally, and that on the record of that case no denial of due process occurred. Suffice it for present purposes to note that the District Court *held*, both as fact and as a conclusion of law, that the United States quite properly represented the interests of both the Newlands Project and the Tribe, and that there was no violation of due process. Nev. App. 189a-190a, 192a. The Court of Appeals did not decide otherwise or disturb these ruling but merely assumed, for purposes of reaching its conclusions, that the Government's representation of the Tribe in *Orr Ditch* had been improper and inadequate. Nev. App. 237a-238a. We would add here only the following observations.

As part of its contention that it was denied due process, the Tribe asserts that the United States was caught in an impermissible conflict of interest that fatally tainted the Government's ability to represent the Tribe's interests adequately. In pressing this argument, the Tribe does not allege any specific misconduct or instances of inadequate representation by Government counsel during the *Orr Ditch* proceedings. As noted above, the District Court found that no such misconduct occurred. Indeed, as set forth in the Statement of the Case, the record shows that Government counsel actively and diligently advanced the Tribe's reserved water rights. For example, they obtained an increase in the Tribe's allotted share of water over that provided in the temporary restraining order, thereby assuring a supply sufficient for future as well as then-current Tribal needs. Nev. App. 209a-210a.

Rather than alleging particular instances of misrepresentation, the Tribe bases its claim simply on the fact that the United States in *Orr Ditch* represented diverse interests. Diversity of interests in litigation involving the United States is not unusual, however. This Court has decided several cases in which the Government has

represented a variety of interests and/or appeared to be litigating in favor of one interest at the expense of another. The Court has never held such representation to be improper, much less in violation of the due process rights of the entities whose interests were at stake.

Indeed, the United States often cannot avoid representation of varied interests in litigation involving water rights. To be effective, an adjudication of water rights must encompass all would-be users of the water, so that all claims may be settled simultaneously and finally. *See Colorado River Water Cons. District* v. *United States*, 424 U.S. at 819. Particularly in the Western states, the extent and variety of Federal reservations makes it highly likely that in any action to quiet title to water rights in the region, the United States will have multiple interests affected. See *United States* v. *New Mexico*, 438 U.S. at 699 & n.3 (1978).

A number of cases decided by this Court have involved such water rights litigation. The Court has not objected to the Govednment's representation of varied interests in these matters on due process or any other grounds. For example, in *Colorado River Water Cons. District* v. *United States*, 424 U.S. at 805, the United States asserted water rights on behalf of itself as well as Indian tribes. In *United States* v. *District Court*, 401 U.S. at 528-529, the interests of the United States included national forests administered by the Agriculture Department, a variety of holdings maintained by the Interior Department, and naval petroleum and oil shale reserves administered by the Department of the Navy. And in *Arizona* v. *California*, 373 U.S. at 595, the Government represented five Indian reservations, as well as national forests and recreational and wildlife areas.[54] At this late

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[54] *See also Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116, 1131 (10th Cir.) ("the United States is the proper party to represent *all* federally reserved water rights, including those set aside for use by the Indian tribes") (emphasis in original), *cert. denied*, 444 U.S. 995 (1979).

date, a holding that Government representation of diverse interests is *per se* a violation of due process would play havoc with numerous quantifications of water rights that the parties thereto have presumed to be final.

The Court has also countenanced the United States representation of diverse, even seemingly conflicting, interests in other contexts, with the warning that courts are not to be distracted by surface anamolies. Rather, it is the quality and adequacy of the representation that is dispositive. *See United States* v. *ICC*, 337 U.S. 426, 432 (1949). In that case, the United States, acting in its capacity as a shipper of goods, sued to have an ICC order set aside. By statute, the United States was required to be named as defendant. Despite this apparent conflict, the Court permitted the suit, finding that vigorous representation had in fact occurred. *Id.* at 430-432.[55] We have previously shown that the Tribe's interests were adequately asserted in the *Orr Ditch* proceeding. That basic requirement having been satisfied, the Tribe cannot maintain that the United States' representation in *Orr Ditch* of diverse interests by itself deprived the Tribe of due process.

It is not irrelevant that the Court of Appeals asks the impossible. Many of the entities for which the United States asserts reserved water rights are executive agencies that lack independent capacity to sue and be sued. *See United States* v. *Remund*, 330 U.S. 539, 541-543 (1947); 43 U.S.C. § 1457 (1976). Even though their water rights claims necessarily conflict, the United States must represent their interests jointly and cannot establish pleading adversity among them.[56] The Indian tribes,

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[55] *See also United States* v. *Nixon*, 418 U.S. 683, 693-697 (1974) (that both parties were members of Executive Branch did not preclude adjudication); *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 647 & n.1 (1954) (Secretary authorized to litigate cases on behalf of shippers of farm products).

[56] *Cf. Defense Supplies Corp.* v. *United States Lines Co.*, 148 F.2d 311, 312-313 (2d Cir.) (no case or controversy exists between gov-

by contrast, have capacity to sue and thus to intervene in water rights adjudications on their own behalf, as the Paiute Tribe has done in the present case.[57] The tribes, however, also enjoy sovereign immunity from suit.[58] The Tribe, accordingly, is protected from the very joinder that the Court of Appeals appears to demand as a prerequisite to holding the Tribe to a water rights judgment.

The last and most troublesome implication of the Court of Appeals' logic is that it has no apparent limitation. To the contrary, the logic extends to any case in which the United States has represented multiple interests. *See generally*, Stern, *supra* note 56. The Court's decision thus threatens to reopen any case in which the United States represented an Indian tribe as well as other interests without establishing formal adversity between them—cases that might range from real property disputes[59] to matters of taxation.[60] Members of Indian

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ernment-owned corporation and United States), *cert. denied*, 326 U.S. 746 (1945); *United States ex. rel. Tennessee Valley Authority* v. *Easement & Right of Way*, 204 F. Supp. 837, 839 (E.D. Tenn. 1962) (court cannot adjudicate intra-agency dispute between TVA and FHA). *See generally* Stern, *"Inconsistency" in Government Litigation*, 64 Harv. L. Rev. 759, 764-768 (1951).

[57] *See United States* v. *Candelaria*, 271 U.S. 432, 442-443 (1926); *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 112 (1919); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 295 (1902); *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U.S. 641, 648 (1890); *Eastern Band of Cherokee Indians V. United States*, 117 U.S. 288, 293 (1826); Nev. App. 183a, 186a. *See generally* F. Cohen, Handbook of Federal Indian Law 283-285 (1942).

[58] *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58-59 (1978); *Puyallup Tribe, Inc.* v. *Department of Game*, 433 U.S. 165, 168-173 (1977); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-515 (1940). *See generally* F. Cohen, *supra* note 56, at 283-285.

[59] *See, e.g., United States* v. *Hellard*, 322 U.S. 363, 366-368 (1944); *United States* v. *Minnesota*, 270 U.S. 181, 193-194 (1926).

[60] *See, e.g., Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 607-608 (1943).

tribes, moreover, are far from the only persons whom the United States has been authorized to represent,[61] or who have lived in a state of dependency on the United States.[62] The Court of Appeals' reasoning would dissolve any judgment, in any type of case, in which, without establing adversity under the pleadings, the United States may have represented the interests of such private persons or dependents, in addition to its own public concerns, or sought to reconcile conflicting public charges. *See generally* Stern, *supra* note 56. For the future, the ruling suggests that the United States must marshall an army of lawyers to assert its various claims in order to assure a binding adjudication. Thus carried to its logical conclusion, the Court of Appeals' approach goes far beyond the bounds of reason.

IV. A FAILURE TO REVERSE AS TO TCID WILL BRING ABOUT INCALCULABLE HARDSHIPS.

The Ninth Circuit's ruling as to all defendants except TCID was correct as a matter of law and should be affirmed; its ruling as to TCID was wrong as a matter of law and should be reversed. Both results flow from the merits and without regard to the equities.

Nevertheless, we would be remiss if we did not point out the extraordinary unfairness, and the practical hardships, of any other results. One aspect of this unfairness relates to the past, and the other to the future.

First, as we have pointed out, an entire region of the State of Nevada has built its livelihood, its very existence, upon the *Orr Ditch* Final Decree. Nev. App. 10a. This was not blind faith. The region was *told* that the order of the court was all-encompassing—and was final. Entire families, businesses and communities have

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[61] *See, e.g., United States* v. *New Orleans Pacific Railroad Co.*, 248 U.S. 507, 518 (1919) (homesteaders).

[62] *See, e.g., Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 313-314 (1937) (Philippines).

been built on the assumption that what the Government, the lawyers, and the courts did in *Orr Ditch* was precisely what they purported to do: quantify the rights to the waters of the Truckee River and establish for all time the relative priorities of every one claiming any portion of those waters.[63] To tell them now—69 years after the Government asked in the *Orr Ditch* complaint that the courts make known how much water could be diverted by whom, for what purposes, and with what priorities,[64] and 38 years after the courts did precisely that in the Final Decree—(Nev. App. 17a-150a)—would be not only beyond the law but wholly inequitable and unfair.

The second point relates to the future. Every one in the region has made his or her plans for tomorrow on the expected flow of water for his or her respective property to fill his or her respective needs. Presumably, even the Indians have accommodated, whether willingly or not, to the present situation.[65] What is to happen if

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[63] Fishing, after all, was not ignored in *Orr Ditch*. As the District Court found in the instant case, "the complaint and the amended complaint in *Orr Ditch* specifically alleged 'fishing' as one of the rights to be adjudicated," and "a full and fair opportunity was provided to the plaintiff and the Tribe to litigate that allegation." Nev. App. 188a. The Court of Appeals apparently agreed. See Nev. App. 211a.

[64] The ruling of the Court of Appeals would permit the United States to take back water rights held since the beginning of the century by the farmers in the Project. These farmers settled on Project land under the incentive of the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*, and in reliance on the water rights granted in *Orr Ditch*. As the District Court indicated (*see* Nev. App. 188a, 191a), these farmers had no more reason to suspect any impropriety in the Government's joint representation than did the *Orr Ditch* defendants.

[65] The Pyramid Lake fishery declined throughout the 1920's and 1930's until, by the early 1940's, the cutthroat trout indigenous to the Lake was extinct. Nev. App. 298a. The State of Nevada commenced a restoration program in the 1940's and through a restocking of the Lake with hatchery fish, the Pyramid Lake

this carefully-constructed balance is upset? True, more water will flow to Pyramid Lake. Given the best of all worlds, the number of fish will increase, and the few hundred Indians on the Reservation will supplement their sustenance. But what of the thousands upon thousands of families, farmers, landowners and businesses that will be deprived, "gallon-for-gallon",[66] of their present water supply? What good will it do them, when crops have dried up and communities have diminished or vanished, to explain that the Final Decree was not final, and that because the Indians and the Newlands Project were not specifically set forth by their Government against each other in 69-year-old pleadings, there must now be a reallocation of the region's life-blood: the scarce water supply that has heretofor served all the people?

We respectfully submit that whether the *Orr Ditch* Final Decree is viewed as a commitment to the past or for the future, it should stand.

CONCLUSION

For each of the reasons set forth in this Brief, the judgment of the Court of Appeals should be affirmed as to all defendants except TCID, and reversed as to TCID.

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fishery had grown to fourth largest in Nevada by 1970, and was being fished 140,000 angler days per year at the time of trial in District Court. Tr. 5770, 5917-18. The Tribe earns revenues from sales of camping, boating and fishing permits. Hatcheries supply large numbers of fish each year (Tr. 988-990), and expert witnesses for the United States, the Tribe, and Nevada agree that there is no significant difference between hatchery or naturally spawned fish. Tr. 2355, 4183, 5711-12. Under current operating conidtions, utilizing the water in the manner provided by the *Orr Ditch* Final Decree, there is sufficient water for natural spawning in most years, with drought years being supplemented by hatchery fish. Tr. 5666-88. The restoration efforts appear to justify optimism for eventual success. Nev. App. 184a, 209a. Thus, the drastic and inequitable step of reopening the *Orr Ditch* Final Decree is not necessary to aid the Lake's fishery; substantial steps to that end have already been undertaken.

[66] *United States* v. *New Mexico*, 438 U.S. at 705.

Respectfully submitted,

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APPENDIX

Exhibit Number		
A-3	Offered	4979
	Offered	4987
	Admitted	4981
A-356	Offered	255
	Admitted	304
A-373	Offered	277
	Admitted	277
A-427	Offered	4501
	Admitted	4583
A-447	Offered	4501
	Admitted	4583
A-461	Offered	4501
	Admitted	4583
A-464	Offered	4501
	Admitted	4583
A-467	Offered	4501
	Admitted	4583
A-506	Offered	4501
	Admitted	4583
A-605	Offered	4501
	Admitted	4583
A-1042L	Offered	5514
	Admitted	5519
A-10115D	Offered	300
	Admitted	308
A-11022B	Offered	252
	Admitted	252
A-11024B	Offered	250
	Admitted	250
A-20157A	Offered	300
	Admitted	308
A-20186A	Offered	282
	Admitted	282
A-20193A	Offered	300
	Admitted	308
A-20198A	Offered	278
	Admitted	278
A-20204A	Offered	295
	Admitted	295
A-20361A	Offered	300
	Admitted	308
A-20375A	Offered	300
	Admitted	308
A-20483A	Offered	287
	Admitted	287
A-30196H	Offered	300
	Admitted	308
A-30767H	Offered	255
	Offered	300
	Admitted	304
	Admitted	308
A-40196B5	Offered	269
	Admitted	270
A-50168B	Offered	300
	Admitted	308
A-50191B	Offered	285
	Admitted	285
A-50239B	Offered	300
	Admitted	308
A-60009F	Offered	300
	Admitted	308
A-60013F	Offered	300
	Admitted	308
A-70002	Offered	5033
	Admitted	5035

Exhibit Number			Exhibit Number		
A-70003	Offered	5043	A-70562	Offered	4052
	Admitted	5044		Admitted	4057
A-70009	Offered	5039	A-70572	Offered	4052
	Admitted	5041		Admitted	4057
A-70101	Offered	5075	A-80241K	Offered	251
	Admitted	5094		Admitted	251
A-70427	Offered	7214	A-90805S	Offered	300
	Admitted	7218		Admitted	308
A-70430	Offered	7222	A-90831S	Offered	300
	Admitted	7224		Admitted	308
A-70502	Offered	4052	A-99001	Offered	229
	Admitted	4057		Admitted	230
A-70505	Offered	4052	A-99002	Offered	231
	Admitted	4057		Admitted	232
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A-70509	Offered	4052	A-99006	Offered	235
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A-70515	Offered	4052	A-99008	Offered	238
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A-70518	Offered	4052	A-99009	Offered	238
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A-70519	Offered	4052	A-99012	Offered	241
	Admitted	4057		Admitted	242
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	Admitted	4057		Admitted	242
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	Admitted	4057		Admitted	244
A-70533	Offered	4052	A-99037	Offered	246
	Admitted	4057		Admitted	246
A-70534	Offered	4052	B-138	Offered	430
	Admitted	4057		Admitted	430

Exhibit Number		
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B-229	Admitted	9162
B-278	Offered	440
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B-291	Offered	441
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B-293	Offered	441
	Admitted	441
B-303	Offered	447
	Admitted	447
B-308	Offered	450
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B-316	Offered	454
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B-317	Offered	457
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B-318	Admitted	9162
B-321	Admitted	460
B-337	Offered	466
	Admitted	466
B-347	Offered	475
	Admitted	475
B-462	Offered	353
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B-484	Offered	370
	Admitted	370
B-492	Offered	376
	Admitted	379
B-495	Admitted	381
B-496	Admitted	382
B-497	Admitted	382
B-499	Admitted	385

Exhibit Number		
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B-515	Offered	408
	Admitted	408
B-516	Offered	409
	Admitted	409
G-29	Offered	333
	Admitted	333
U-10	Offered	1042
	Admitted	1059
U-12	Offered	1042
	Admitted	1059
U-95	Offered	300
	Admitted	300
U-100	Offered	1044
	Admitted	1059
U-101	Offered	265
	Admitted	265
U-106	Offered	300
	Admitted	308
U-113	Offered	259
	Admitted	259
U-114	Offered	262
	Admitted	262
U-152	Offered	1045
	Admitted	1059
U-169	Offered	274
	Admitted	274
U-205	Offered	1046
	Admitted	1059
U-214	Offered	1046
	Admitted	1059

Exhibit Number			Exhibit Number		
U-223	Offered	1046	U-276	Offered	448
	Admitted	1059		Admitted	448
U-233	Offered	1046	U-277	Offered	1047
	Admitted	1059		Admitted	1059
U-262	Offered	1047	U-278	Offered	1047
	Admitted	1059		Admitted	1059
U-263	Offered	1047	U-281	Offered	1047
	Admitted	1059		Admitted	1059
U-265	Offered	1047	U-294	Offered	1047
	Admitted	1059		Admitted	1059
U-266	Offered	1047	U-295	Offered	1047
	Admitted	1059		Admitted	1059
U-267	Offered	1047	U-296	Offered	1047
	Admitted	1059		Admitted	1059
U-269	Offered	437	U-333	Offered	1048
	Admitted	437		Admitted	1059
U-270	Offered	1047	U-491	Offered	8978
	Admitted	1059		Admitted	8979
U-272	Offered	1047	U-543	Offered	9200
	Admitted	1059		Admitted	9205
U-273	Offered	444	V-259	Offered	9172
	Admitted	444		Admitted	9176